COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE CITY OF ALBUQUERQUE, and THE BERNALILLO COUNTY COMMISSIONERS, Plaintiffs, v. SPARTON TECHNOLOGY, INC., Defendant.	§	CIVIL ACTION NO. CIV-97-0206-LH
STATE OF NEW MEXICO, THE NEW MEXICO ENVIRONMENT DEPARTMENT, and THE NEW MEXICO OFFICE OF THE NATURAL RESOURCES TRUSTEE, Plaintiffs, v. SPARTON TECHNOLOGY, INC., Defendant.	§	CIVIL ACTION NO. CIV-97-0208-JC
UNITED STATES OF AMERICA, Plaintiff, v. SPARTON TECHNOLOGY, INC., Defendant.	§	CIVIL ACTION NO. CIV-97-0210-M

DEFENDANT SPARTON TECHNOLOGY, INC.'S
RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

I.
INTRODUCTION

A. Factual Background

From 1961 through approximately 1993, Sparton Technology, Inc. ("Sparton") manufactured, at a plant located at 9621 Coors Road, N.W. (the "Coors Road Plant"), switches and other electronic components, for nuclear devices used by the federal government in winning the "Cold War."[1] In manufacturing these switches, and other electronics components, Sparton was required by the United States Government to use various solvents as degreasers to clean the materials used in the assembling of finished products. Solvents used as degreasers became contaminated with the dirt they were designed to remove from parts. Once they became so dirty that they no longer served the purpose for which they were intended, they became "spent" and needed to be discarded. For many years, and in keeping with standard industry practice, Sparton stored these "spent solvents" in an outdoor sump on its property. Mico Aff. ¶¶ 3 & 4; EPA Exh. 0. not stored, discharged to soil and GW

Effective November 19, 1980, regulations issued under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C §§ 6901-6992K, became applicable to the disposal of "spent solvents." 45 Fed. Reg. 33108 (May 19, 1980). As part of that regulatory program, Sparton was required to notify the United States Environmental Protection Agency ("EPA") about its handling of "spent solvents." *Id.* at 33154. That notification then triggered additional obligations on the part of Sparton to investigate what impact past practices related to discarding those "spent solvents" may have had on the environment. EPA Exh. H. As part of that process, Sparton, in coordination with the EPA, began an investigation of the quality of groundwater under its property, and discovered in 1984 that the types of solvents it had used as degreasers were found in the groundwater under its property. EPA Exh. L.

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[1] The plant is currently used as a small machine shop, with two employees and a church. Affidavit of Richard Mico ("Mico Aff.") ¶ 3 (Exh. "A").

As a result of that finding, Sparton entered into an Administrative Order on Consent ("AOC") with EPA that was effective on October 1, 1988. Mico Aff. ¶ 7. Under the AOC, Sparton was required to investigate the extent of impacts associated with its waste handling practices for "spent solvents" and then propose a plan for dealing with any impacts found to exist. EPA Exh. S. The activities of Sparton under the AOC were conducted with the involvement of and subject to review by EPA and to a more limited extent by the New Mexico Environment Department ("NMED"). Sparton fulfilled all of its commitment under the AOC in a timely fashion. Mico Aff. ¶ 7.

The first study provided to EPA was a RCRA Facility Investigation, submitted in draft form in 1989 and approved by EPA in July 1992. Sparton also submitted a report evaluating the effectiveness of a system it had put in place in to restrict further migration of solvents into groundwater off of its site. That report was submitted to EPA in October 1989 and approved by EPA in June 1996. Finally, Sparton submitted a Draft Corrective Measures Study ("CMS") to EPA in November 1992, which outlined the company's proposal for dealing with both on-site and off-site impacts associated with its prior manufacture of switches and other electronic components. EPA submitted final comments to Sparton on that draft in March 1996. Sparton submitted its draft final CMS Report to EPA on May 13, 1996. Mico Aff. ¶ 8.

The 8 years of work conducted by Sparton, with EPA approval, reveal that solvents moved through the soil at its plant, reached groundwater under that plant and then were carried off-site with groundwater as it flowed to the northwest away from the Coors Road Plant. As of July 1996, spent solvents have been found approximately 900 yards, northwest of the Coors Road Plant, within the top 50 to 100 feet of the groundwater environment, and moving in a generally northwesterly direction at a rate of approximately 100 feet per year. Affidavit of

Pierce L. Chandler, Jr. ("Chandler Aff.") ¶ 4 (Exh. "B"); Affidavit of Steven P. Larson ("Larson Aff.") ¶ 5 (Exh. "C"); EPA Exh. 3.

No drinking water wells are completed in that part of the groundwater that has been impacted by solvents associated with the Coors Road Plant. Deposition of Norman Gaume ("Gaume Depo.") at 82-84.[2] The City of Albuquerque has no permit to complete wells in the groundwater that has been impacted and has no applications for permits for such wells. *Id.* The nearest City of Albuquerque public water supply wells are approximately 3.5 miles to the southwest of the impacted groundwater and not in the direction of the flow path of the solvents. Chandler Aff. ¶ 6. There is no city-owned infrastructure in the vicinity of the impacted groundwater for delivery water to customers, and, therefore the city could not transfer water produced from wells in the impacted area to its customers. Gaume Depo. at ¶ 84-85. Of course, it would be surprising for any city water infrastructure to be in the area, given that it is part of New Mexico Utilities franchise area. Gaume Depo. at 78-79; Chandler Aff. ¶ 6. The most recent city study on locating future public water supply wells establishes that the City of Albuquerque does not intend, at least through the year 2060, to place any public water supply wells in the impacted area or within the current flow path of the impacted groundwater.[3] *Id.* at ¶¶ 7-8. There is a public water supply well approximately two miles away from the impacted groundwater (owned by New Mexico Utilities, which is not a plaintiff in any of these lawsuits). *Id.* at ¶ 13. If nothing is done to contain the impacted groundwater, solvents would not reach that well for at least 100 years, if at all, and then probably at concentrations below drinking water standards. *Id.*

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[2] All of the noted pages of Mr. Gaume's deposition are included in Exhibit "D."

[3] A 1982 master plan for City of Albuquerque water supply, which was never adopted by the City Council, produced by a private consultant, and serves as a guide subject to revision, appears to have been superseded. Gaume Depo. at 70-71; 104.

Notwithstanding the absence of any current or future threat to any public water supply well from the impacted groundwater, Sparton in July of 1996 offered to take steps to prevent further movement of solvents in groundwater found off-site, to enhance the containment of solvents in groundwater found on-site, and to remove any solvents that may remain in the soil above the groundwater on its property to levels acceptable to EPA and NMED. Mico Aff. ¶ 10. Sparton has been unable to implement that proposal because, notwithstanding the 8 years of study that have already gone on, EPA and NMED believe further investigation is required, and because EPA and NMED have failed to issue necessary authorizations allowing Sparton to discharge recovered and treated groundwater to the nearby Calabacillas Arroyo. Mico Aff. ¶ 12; Affidavit of Maria O'Brien ("O'Brien Aff.") ¶ 2-8 (Exh. "E"); Affidavit of Pete Metzner ("Metzner Aff.") ¶ 1-7 (Exh. "F"). Sparton's consultants have determined that discharge into the Arroyo at rates necessary to achieve containment would not reach the Rio Grande. Instead the discharged water would work its way back to the groundwater from which it had been removed.

Sparton must follow permit procedures

∴ DP needed

B. Legal Background

The EPA, NMED, the City of Albuquerque, and the County of Bernalillo filed, on February 19, 1997, an action alleging that the groundwater Sparton had impacted presents an "imminent and substantial endangerment" to human health and the environment. The relief sought through these lawsuits is an order directing Sparton to take actions necessary to deal with that alleged endangerment. These actions are brought more than 13 years after EPA and NMED were first aware of impacts to groundwater, and at least 6 years after the City of Albuquerque became aware of the situation. EPA Exh. L; Gaume Depo. at 138.

At the same time that these lawsuits were brought, there was pending before EPA Region 6 in Dallas an administrative proceeding involving an order issued by EPA Region 6,

purportedly under the authority of § 3008(h) of RCRA, 42 U.S.C. § 6928(h). The order directs Sparton to take specified actions to address the same impacted groundwater identified in these lawsuits. An administrative hearing on that order was held on March 27, 1997. It is anticipated that, unless that proceeding is enjoined, EPA will issue a decision on what remedy Sparton should implement. The relief sought in the administrative proceeding is essentially identical to what is sought in these lawsuits.

Finally, there is pending in federal court in Dallas an action by Sparton against EPA, alleging that the agency violated the AOC in the way it identified a remedy to address the impacted groundwater associated with the Coors Road Plant. *See* Sparton's pending Motion to Stay, Dismiss or Transfer Venue. The relief sought in the Dallas Litigation is an order prohibiting EPA from continuing to proceed with the administrative proceeding and directing EPA to follow its commitments under the AOC. *Id.* The outcome of that case will directly impact what relief the Court might be able to order in these lawsuits. *Id.*

C. **Relief Sought**

DOJ, We told you so!

In its motion for preliminary injunction, EPA does not request that Sparton take any action that immediately contains the impacted groundwater or removes constituents of concern. Instead, the agency wants additional testing to be completed. While EPA believes such testing would cost between $300,000 and $350,000 and could be completed within 60 days, Sparton's consultant has estimated that the investigation will cost more than $500,000 and require at least 168 days to complete. Affidavit of Gary Richardson ("Richardson Aff.") ¶ 7 (Exh. "G"). Additionally, Sparton's hydrogeologist is of the view that the further investigations sought by EPA are a waste of time and money. Larson Aff. ¶¶ 4-18. The work that has been done over the last 8 years is more than sufficient for purposes of designing and operating the containment system that EPA wants installed after further testing is complete. *Id.*

Why no SVE?

II.

ARGUMENT AND AUTHORITIES[4]

A. EPA's Proposed Affirmative Relief Is Not the Proper Subject of a Preliminary Injunction.

1. Preliminary Injunctive Relief Is Disfavored When There Is No Ongoing Conduct of the Defendant to Stop.

The environmental impacts complained of in this action were caused by a manufacturing process that Sparton no longer uses. Mico Aff. ¶ 6. Sparton has not engaged in the activities resulting in these environmental impacts since the end of 1986. *Id.* ¶ 5. Thus, although Sparton's activities resulted in the contamination EPA complains of, the contamination now expands entirely independently of any ongoing Sparton activities. Chandler Aff. ¶ 5. Instead, physical and chemical processes, which Sparton is not controlling, determine the movement of solvents in the groundwater. *Id.* Under these circumstances, the affirmative relief EPA seeks is not the proper subject of a preliminary injunction.

For example, in *Brown v. Kerr-McGee Chemical Corp.*, the Seventh Circuit acknowledged that a preliminary injunction would not have been available to adjacent property owners seeking to compel Kerr-McGee to remove hazardous waste to a safe distance.[5] Although normally the property owners' failure to seek a preliminary injunction would indicate a lack of irreparable harm, no preliminary injunctive relief could have been granted in the case, because Kerr-McGee was no longer creating and dumping hazardous waste on the site.[6] The court

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[4] Attached as Exhibit "H" are Sparton's objections to the EPA's Exhibits to the Motion for Preliminary Injunction. If those objections are sustained, virtually all support for the Motion for Preliminary Injunction is inadmissible, requiring summary denial of the request.

[5] 767 F.2d 1234, 1240 (7th Cir. 1985), *cert. denied*, 475 U.S. 1066.

[6] *Id.* at 1239-40.

concluded it would have been "irrational" for a district court to enter a preliminary injunction ordering Kerr-McGee to remove hazardous wastes from the site:

> The present case differs in that here preliminary injunctive relief was impractical. Plaintiffs claim that toxic wastes on Kerr-McGee's property have caused, and continue to cause, serious, perhaps irreparable, harm to plaintiffs' health and to their property. If Kerr-McGee were still creating and dumping toxic wastes on the site, plaintiffs could request a preliminary injunction enjoining Kerr-McGee from further dumping. But plaintiffs admit that Kerr-McGee has not operated the factory since 1973, and it would be irrational for a district court to enter a *preliminary* injunction ordering Kerr-McGee to remove all toxic wastes from the West Chicago site.[7]

Preliminary relief is normally not available when the non-movant is no longer engaging in the alleged injurious conduct.[8] As a result, a preliminary injunction may not be used to force Sparton to study environmental impacts to which Sparton is no longer contributing.

2. Preliminary Injunctive Relief That Compels Action Is Disfavored Because Of The Difficulty In Determining And Fashioning An Appropriate Remedy And The Need For Continuing Supervision.

Through its motion, EPA asks this Court to decide what further testing, if any, is necessary, not to correct impacts to groundwater associated with Sparton's Coors Road Plant, but to better understand them. Sparton's hydrogeologist, Steven P. Larson, argues the testing EPA proposes is generally unnecessary. Larson Aff. ¶¶ 4-18. The impacts to groundwater are already sufficiently understood to move forward with corrective action. *Id.* Without the benefit of a fully developed record, the Court is asked to decide between these conflicting views of

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[7] *Id.* (citing *Triebwasser & Katz v. American Telephone & Telegraph Co.*, 535 F.2d 1356, 1360 (2d Cir. 1976)).

[8] *See Hutchinson v. Pfeil*, 105 F.3d 566, 570 (10th Cir. 1997) (citing *Brown v. Kerr-McGee Chem. Corp.* and *Volvo N. Am. Corp. v. M.I.P.T.C.*, 839 F.2d 69, 74 (2d Cir. 1988)).

experts. In similar situations other courts have declined such an invitation, as should this Court.[9]

Granting a preliminary injunction will also require on-going supervision. What happens if well locations need to be changed? What if the results are not what EPA expects? Can Sparton be required to spend more money than estimated by EPA? What if additional time is necessary to complete any work plan? The need for a court to address such concerns on an on-going basis has caused other courts to decline to order affirmative relief through a preliminary injunction.[10]

3. EPA's Request For Affirmative Relief Is Premature.

Traditionally, the purpose of a preliminary injunction is only to preserve the status quo until trial.[11] The status quo is not defined by the parties' existing legal rights. Instead, it represents existing circumstances, regardless of whether what exists is in accord with the parties' legal rights.[12] Consequently, a request for a preliminary injunction that would alter the status quo "confuses 'what should be' with 'what is'."[13] Unless a movant seeking to alter the status quo can show that something new is happening to merit extraordinary relief, the movant fails

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[9] *See, e.g., Friends of the Earth v. Wilson*, 389 F. Supp. 1394, 1395-96 (S.D.N.Y. 1974) (denying mandatory preliminary injunction requiring defendants to comply with air quality implementation plan because of highly technical nature of both proof and remedy sought and because court should not grant relief requiring continuous judicial supervision).

[10] *See SCFC ILC*, 936 F.2d at 1099 (observing that court should deny affirmative preliminary relief when it will place the issue in court in the position of having to provide ongoing supervision to assure that the non-movant is abiding by the injunction).

[11] *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1099 (10th Cir. 1991).

[12] *Id.* at 1100; Here the status quo is the presence of solvents in groundwater, advancing at a rate of approximately 100 feet per year. That is the existing circumstance. Whether it should continue depends on a final determination of what legal responsibility Sparton has to address that situation.

[13] *Id.*

to meet its burden of proof as to preliminary relief, even if the movant establishes there is some merit to its case.[14]

In this matter, EPA asks this Court to alter the status quo by compelling Sparton to expand upon over 8 years of completed study. EPA does not show, however, that something new is happening to require such immediate extraordinary relief. In fact, the solvents in the groundwater are behaving today as they have for the past 13 years. Today, as for the past 13 years, no drinking water wells are completed in the impacted groundwater, nor are there any plans to complete such wells. Conditions that have existed over the past 13 years have not previously prompted the Plaintiffs to seek an injunction. In fact, as discussed below, EPA brings this action after knowing for 13 years that this contamination had occurred and is spreading. Moreover, EPA's request would not alter the status quo in a way that would abate or reverse these environmental impacts. The study requested would gather only substantially duplicative information about the extent of the environmental impacts. Larson Aff. ¶¶ 4-18. Because the proposed affirmative relief sought by EPA will not by itself correct the alleged imminent endangerment, the study could as easily be done in conjunction with any clean-up efforts required after a trial on the merits.

For example, in *United States v. Price*, the District Court of New Jersey denied the United States a mandatory preliminary injunction requiring a landfill owner to remedy hazards posed by chemical dumping that had occurred at the landfill ten years earlier.[15] In that case, EPA sought two forms of preliminary injunctive relief against the landfill owner: (1) that the owner be compelled to fund a study to determine the extent of the problem posed by leachate from the landfill; and (2) that owner be required to provide an alternate water supply to private

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[14] *Bell Atl. v. Hitachi Data Sys.*, 856 F. Supp. 524, 525 (N.D. Cal. 1993).

[15] 523 F. Supp. 1055, 1068 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982).

well owners whose wells had been contaminated.[16] Although the court agreed that a thorough study of the problem was essential and should be done immediately, the court refused to order the landfill owner to fund a study as a form of preliminary injunctive relief.[17] Furthermore, because the landfill owner was no more able than the homeowners or the EPA to provide an alternate water supply, EPA's second request for preliminary relief -- compelling defendants to provide an alternate water supply to homeowners whose wells had been contaminated -- merely sought to shift the cost of remediation prior to a determination of the merits. Therefore, the EPA's request was not an appropriate matter for preliminary injunctive relief.[18]

B. **Even If The Affirmative Relief EPA Requests Were Properly the Subject Of A Preliminary Injunction, EPA Has Not Met Its Burden Of Proof.**

As EPA recognizes, to obtain preliminary injunctive relief it must establish:

(1) a substantial likelihood that the movant will eventually prevail on the merits;

(2) a showing that the movant will suffer irreparable injury unless the injunction issues;

(3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and

(4) a showing that the injunction, if issued, would not be adverse to the public interest.[19]

A preliminary injunction is an extraordinary and drastic remedy that should not be granted unless the movant makes a clear showing that its right to relief is unequivocal.[20] In addition, when the movant seeks a mandatory, as opposed to a prohibitory injunction, the burden of proof is

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[16] *Id.* at 1066.

[17] *Id.* at 1067.

[18] *Id.* at 1068.

[19] *SCFC ILC*, 936 F.2d at 1098.

[20] *See id.*

heightened.[21] The movant must show that the four factors listed above weigh "heavily and compellingly" in the movant's favor.[22]

1. There Is No Substantial Likelihood EPA Will Prevail On the Issue Of Whether An Imminent And Substantial Endangerment Exits.

a. It is the province of the court to determine whether the Sparton site poses an imminent and substantial endangerment.

The interpretation of a statute presents a question of law, and "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The determination of whether a given set of facts constitutes an "imminent and substantial endangerment" is a question of law. *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 197 (W.D.Mo. 1985); *see, e.g., Brock v. Louvers & Dampers, Inc.*, 817 F.2d 1255, 1258 (6th Cir. 1987) (courts may not abdicate their ultimate responsibility to determine congressional intent).

b. Any determination by EPA or NMED regarding an imminent and substantial endangerment is a litigation position to be accorded no deference by this Court.

Plaintiffs include with their motion one document prepared by EPA and another by NMED that purport to "find" that the Sparton site constitutes an imminent and substantial endangerment.[23]

EPA's Determination is entitled to no deference because it is incomplete and inconsistent with EPA's guidelines for assessing endangerment under RCRA section 7003. Absent from the

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[21] *Id.*

[22] *Id.* at 1098-99.

[23] "Determination of Imminent and Substantial Endangerment Pursuant to Section 7003 of RCRA and Section 1431 of the SDWA," issued February 14, 1997, by EPA, EPA Exh. 1, Attachment AA (the "EPA's Determination"); "Finding of Imminent and Substantial Endangerment," issued February 14, 1997 by the New Mexico Office of the Natural Resource Trustee and the New Mexico Environment Department, EPA Exh. 4 (the "State's Finding").

Determination are most of the key steps in EPA's process of deciding whether a site poses an imminent and substantial endangerment. *See* Endangerment Assessment Handbook §§ 3.2, 3.3 and 3.4, OSWER Directive 9850.2 at 3-3 through 3-9, 1986 WL 263585 at *13-*15. There is no identification of exposure routes, analysis of exposed populations (human populations, sensitive subsets of human population and/or fish and wildlife populations which may be at risk) or calculation of exposure level and dose incurred (yields a qualitative or quantitative estimate of the expected exposure levels resulting from actual or potential releases of contaminants from the site). Endangerment Assessment Handbook § 3.2, OSWER Directive 9850.2 at 3-3, 3-4, 1986 WL 263585 at *13, *14. Nor is there a toxicity assessment, which is designed to determine the nature and extent of health and environmental hazards associated with exposure to the contaminants present at the site, consisting of a toxicological evaluation and a dose-response assessment. *Id.* § 3.3 at 3-4 through 3-6, 1986 WL 263585 at *14-*15. Finally, no risk characterization is presented, which estimates "the incidence of an adverse health or environmental effect under the various conditions of exposure defined in the exposure assessment." *Id.* § 3.4 at 3-6 through 3-10, 1986 WL 263585 at *15-*16.

Because EPA's Determination fails to address these key issues, which the agency itself has set forth as critical factors in determining if an "imminent and substantial endangerment" exists, it is entitled to no deference by this Court.[24]

More significantly, neither the EPA Determination nor the State's Finding were developed as part of an agency rulemaking or adjudication. They are informal pronouncements prepared by Plaintiffs in anticipation of this litigation. Stated somewhat differently, neither

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[24] The State's Finding is also entitled to no deference or weight. Whether a situation constitutes "imminent and substantial endangerment" under the RCRA citizen's suit provision is an element a citizen must prove to obtain injunctive relief. Congress did not delegate to either EPA or to citizen's the authority to make such determinations. It is a question of law for the court's determination. *Conservation Chemical*, 619 F.Supp. at 197. Further, the State's Finding is devoid of any reasoned risk assessment supporting the conclusions reached. Therefore, it is entitled to no deference or weight other than that usually accorded the argument of parties.

"determination" has been the subject of notice and comment. Prior to this lawsuit, Sparton has never had an opportunity to challenge the unsupported findings in these documents.

Not coincidentally both "determinations" were completed days before these lawsuits were filed. There can be little doubt they were developed to aid the litigation. As mere litigation positions, the Court is not bound by these "findings" and should accord them no more deference than that usually accorded arguments presented by any litigant. *Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 991 (1st Cir. 1995); *see also,* Davis and Pierce, *Administrative Law Treatise*, § 3.5 at 119-20 (3d ed. 1994) (explaining that the deference courts accord agency interpretations of statutes as set forth in legislative rulemaking, which is commonly called *Chevron* deference, is not applicable to agency policy decisions announced in formats Congress has not authorized for that purpose, such as litigation positions and agency guidance documents).

c. Plaintiffs have failed to make a *prima facie* case showing a reasonable probability that they will be entitled to relief.

In order to prevail on their motion for preliminary injunction, the EPA must make a *prima facie* case showing there is a reasonable probability that ultimately it will be entitled to relief. *Crowther v. Seaborg*, 415 F.2d 437 (10th Cir. 1969). One of the elements EPA must demonstrate to establish a *prima facie* case of liability under sections 7002 or 7003 RCRA[25]

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[25] RCRA section 7002(a)(1)(B) provides as follows:

> any person may commence a civil action on his own behalf--
> . . .
> (B) against any person ... including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste *which may present an imminent and substantial endangerment to health or the environment* ...

RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (emphasis added).

RCRA 7003(a) provides as follows:

> [U]pon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste *may present an*

or the emergency powers provision of the Safe Drinking Water Act ("SDWA"),[26] are conditions that present or may present an "imminent and substantial endangerment."[27] *United States v. Aceto Agr. Chemicals Corp.*, 872 F.2d 1371, 1382-83 n.9 (8th Cir. 1989) (*prima facie* case under RCRA § 7003); *Foster v. United States*, 922 F. Supp 642, 660 (D.D.C. 1996) (*prima facie* case under RCRA § 7002). As set forth in detail below, EPA has failed to meet this burden.

The imminent and substantial endangerment language "is plainly intended by Congress to limit the reach of RCRA to sites where the potential for harm is great." *United States v. Aceto Agr. Chemicals Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989). An endangerment is "imminent" if it "'threaten[s] to occur immediately.'" *Meghrig v. KFC Western, Inc.*, 116 S. Ct. 1251, 1255 (1996) (quoting Webster's New International Dictionary of English Language 1245 (2d ed. 1934)). An endangerment is "substantial" if "there is reasonable cause for concern

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> *imminent and substantial endangerment to health or the environment*, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person ... who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal ... to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both.

RCRA § 7003(a) (emphasis added), 42 U.S.C. § 6973(a).

[26] SDWA section 1431 provides as follows:

> [T]he Administrator, upon receipt of information that a contaminant which is present in or is likely to enter a public water system or an underground source of drinking water *may present an imminent and substantial endangerment to the health of persons* ... may take such actions as he may deem necessary in order to protect the health of such persons.

SDWA § 1431(a), 42 U.S.C. § 300i.

[27] There are other elements of a *prima facie* case under RCRA, but Sparton does not dispute they exist. The other elements of a *prima facie* case under section 1431 of the SDWA, are in dispute. These include: (1) is the contamination present in or is it likely to enter a public water system or an underground source of drinking water and (2) have the appropriate state and local authorities failed to act to protect the health of such persons. SDWA § 1431. Because EPA has failed to advance proof on these issues, and because the "imminent and substantial endangerment" showing under the two statutes is essentially the same, this part of the brief will focus only on the RCRA claim.

that someone or something may be exposed to a risk of harm ... if remedial action is not taken." *Foster*, 922 F. Supp. at 661; *Conservation Chem. Co.*, 619 F. Supp. at 194 (emphasis added).

Courts have consistently held that contamination does not present an imminent and substantial endangerment to human health or the environment where there is no present completed exposure pathway of contamination to someone or something. In *Meghrig v. KFC Western, Inc.*, the Supreme Court denied a claim for clean up costs under RCRA section 7002(a)(1)(B), stating that the "language" implies that there must be a threat which is present *now*, although the impact of the threat may not be felt until later.'" *KFC Western*, 116 S. Ct. at 1255 (emphasis in original). As support for this conclusion, the Supreme Court relied upon *Price v. United States Navy*, 39 F.3d 1011, 1019 (1994), where the presence of lead-contaminated soil under plaintiff's home was found not to be an imminent and substantial threat because the foundations and driveways acted as effective barriers, blocking the only pathway to the contamination. *Price*, 39 F.3d at 1020.

Likewise, in *Davies v. National Co-op. Refinery Ass'n*, the court found no "substantial endangerment" even where the plaintiffs' water wells were contaminated, because the plaintiffs and other "receptors" were aware of the contamination and were using an alternative water supply. *Davies v. National Co-op. Refinery Ass'n*, 1996 WL 529208, *2 (D.Kan. 1996). Relying on *Price*, the court explained that the ***risk of exposure*** is part of the equation in determining what constitutes an imminent endangerment to health. *Id.* Although there was a pathway of exposure to the contamination through the plaintiffs' well, the *Davies* court found that the "imminent risk" to the plaintiffs' health was diminished by the alternative water supply.[22]

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[22] *But cf. U.S. v. Waste Indus., Inc.*, 734 F.2d 159, 162-63 (4th Cir. 1984). In *Waste Industries* the court found an imminent and substantial endangerment where the county had provided another drinking water source. In this early (1984) case, as well as others the Plaintiffs cite, the court did not factor in the risk of exposure. The court discusses risks posed by trichloroethylene and other chlorinated solvents, stating that they "pose an

The court reached a similar conclusion in *Foster v. United States*. 922 F.Supp. 642, 660 (D. D.C. 1996), which relied on *Price* and *Conservation Chemical* in finding there was no imminent and substantial endangerment where the risks to human health and the environment posed by contaminated soil and groundwater "appear small and manageable." *Foster*, 922 F. Supp. at 662. In *Foster*, there was no present exposure pathway because contaminated soil was covered with asphalt pavement and contaminated groundwater was not used. *Id.* at 650, 660-662. According to the *Foster* court, "[w]hile there can be no question that the levels of contamination present at the site may warrant future response action, the plaintiff cannot establish either a current risk of "'substantial or serious' threatened harm, or 'some necessity for action.'" *Id.*

In this case, Plaintiffs appear to take the position that the mere presence of contaminants in soil or groundwater is sufficient to constitute "imminent and substantial endangerment." However, the courts no longer support that position. To constitute "endangerment" or a "risk of harm", there must be a complete exposure pathway to the contaminants. Further, exposure alone does not cause "harm." If residents are exposed to water that is contaminated in excess of drinking water standards, they have an increased "risk of harm" or threatened harm, not actual harm. The harm, if it develops at all, may take years to appear. It follows that if there is no possibility of exposure to the contamination, there is no risk of harm. *Price*, 39 F.3d at 1020; *Davies*, 1996 WK 529208 at *2, and *Foster*, 922 F. Supp. at 660-62.

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unacceptably high risk of neurological damage in children and cancer in humans of any age," Id. at 162. This, of course, assumes that children and humans come in contact with the contaminated water, i.e., that there is a completed exposure pathway. There is no discussion in *Waste Industries* about the need for an exposure pathway to be complete before an "imminent and substantial endangerment" exists. The absence of any teaching on that issue is not surprising given that the main thrust of the appeal was whether RCRA § 7003 is applicable to inactive "disposal," and whether § 7003 is limited to emergency situations. Whether the site posed a risk of endangerment was not at issue.

In each case cited by EPA, in which a court granted relief under RCRA § 7002 or § 7003, ***there was an existing exposure pathway*** to human or environmental receptors.[29] *Dague v. City of Burlington*, 935 F.2d 1343, 1356 (2d Cir. 1991) (landfill posed imminent and substantial endangerment where monitoring indicated leachate was leaking into soil, groundwater, and surface waters of the Interval wetland, and the leachate was toxic to freshwater aquatic life, including one vertebrate in the food chain); *U.S. v. Waste Indus., Inc.*, 734 F.2d 159, 162 (4th Cir. 1984) (contamination from landfill operations was present in residential wells at levels sufficient to adversely affect human health and the environment); *Morris v. Primetime Stores of Kansas, Inc.*, 1996 WL 563845, *4 (D. Kan. 1996) (gasoline seepage under plaintiffs' homes posed such an exposure threat that the state prohibited plaintiffs from occupying their homes); *United States v. Valentine*, 856 F. Supp. 621 (D.Wyo. 1994) (site may pose an imminent and substantial endangerment where toxins in open, unlined pits and leaking above-ground tanks posed significant health risks to birds and other wildlife); *Lincoln Properties, Ltd. v. Higgins*, 1993 WL 217429, *13-14 (E.D.Cal. 1993) (groundwater contamination was above state action levels in one county well and had already forced the abandonment of that well and three other county wells); *Conservation Chem. Co.*, 619 F. Supp. at 197-202 (contaminated groundwater from the site was discharging 22,000 pounds of hazardous substances into the Missouri and Blue rivers each year, and those rivers were exposure pathways for human and environmental receptors). Other cases Plaintiffs cite are silent with respect to the issue of

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[29] As discussed in footnote 28, none of these cases survive the finding of *KFC* that an actually, as opposed to a potentially, completed pathway of exposure must exist for an "imminent and substantial endangerment" to be found.

imminent and substantial endangerment. *See U.S. v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 810 F.2d 726, 730 and 745 (8th Cir. 1986).[30]

In spite of the case law to the contrary, Plaintiffs rest their case solely on the fact that contamination is present in groundwater at concentrations that exceed federal and state drinking water standards.[31] Plaintiffs acknowledge that the contamination is approximately two miles from the closest downgradient drinking water well and is moving toward the well at a rate of 100 to 300 feet per year, but do not point to any currently completed exposure pathway to human or environmental receptors. Thus, there is no current risk of harm and certainly no "imminent and substantial" endangerment because there is no completed exposure pathway to the contaminated portion of the aquifer.

A finding of no imminent and substantial endangerment is consistent with the analysis of Sparton's expert. In his affidavit, Dr. Glenn C. Millner explains in great detail why the site does not present an imminent and substantial endangerment to human health or the environment. Affidavit of Glenn C. Millner ("Millner Aff.") ¶¶ 7-25 (Exh. "I"). Reduced to its essentials, Dr. Millner's opinion is that: (1) because no one is currently drinking the water, there is no "imminent or substantial endangerment"; (2) even if at some future time the impacted water serves as a water supply source, the concentrations of constituents of concern do not necessarily provide a threat to health; (3) the impacted groundwater has quality problems independent of the impacts from the Sparton Plant that could preclude its use as a public water supply; and (4) EPA

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[30] *See Furrer v. Brown*, 62 F. 3rd 1092, 1101 (8th Cir. 1995) (explaining that the parties did not raise the issue of RCRA section 7003 jurisdiction in *U.S. v. Northeastern Pharmaceutical & Chem. Co.*, but simply assumed jurisdiction *sub silentio* to deal with the merits of EPA's claims to recover cleanup costs under that section).

[31] In his affidavit, Norman Gaume expressed concern that these impacts were in a "crucial area for groundwater protection." At his deposition Mr. Gaume had to admit the report he references specifies all groundwater in areas where the city might drill as crucial. Gaume Depo. at 59, 61-62. Yet other areas of contamination have not generated the same interest from the City as has Sparton's situation.

interest, while moving forward now to contain the impacted area would serve the public interest. Unfortunately, for reasons that are not at all clear, the plaintiffs have been unwilling to grant Sparton authorization necessary to implement containment. By granting the requested relief, the court would only encourage further delays of the type that have resulted in over 8 years being consumed to study conditions at the site and propose a remedy. Such delay would appear to be contrary to the public interest and should not be encouraged.

The attached affidavits of Richard Mico, Vice President and General Manager of Sparton, Maria O'Brien, local counsel for Sparton, and Pete Metzner, local consultant for Sparton, detail the company's efforts to move forward on containment and the lack of cooperation from certain regulatory authorities. Sparton believes it is not unfair to infer that certain regulatory agencies are operating from a political agenda, instead of on the basis of legitimate technical concerns about how to address the impacted groundwater.

III.
CONCLUSION

Based on the foregoing, Sparton requests that the Motion for Preliminary Injunction be denied.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

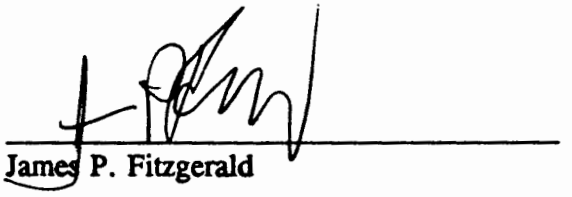
By _____
James P. Fitzgerald
Attorneys for Defendant
Post Office Box 1888
Albuquerque, New Mexico 87103
Telephone: (505) 765-5900
Fax: (505) 768-7395

THOMPSON & KNIGHT
A Professional Corporation
James B. Harris
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201
Telephone: (214) 969-1102
Fax: (214) 969-1751

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

On the 15th day May, 1997, an original and two copies of the foregoing document was hand-delivered to Plaintiff United States of America, with copies hand-delivered to all other counsel of record.



James P. Fitzgerald